

**Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

DANIEL B. SCHUETZ

Witte & Schuetz
Columbus, Indiana

ATTORNEY FOR APPELLEE:

LISA A. ANDERSON

Bartholomew County Department of Child
Services
Columbus, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE TERMINATION OF)
THE PARENT-CHILD RELATIONSHIP OF D.M.,)
K.M., and J.M.,)
Children, and NANCY MOORE, Their Mother,)
NANCY MOORE,)
Appellant-Respondent,)
vs.)
BARTHOLOMEW DEPARTMENT OF CHILD)
SERVICES,)
Appellee-Petitioner.)

No. 03A04-0707-JV-369

APPEAL FROM THE BARTHOLOMEW JUVENILE COURT
The Honorable Stephen R. Heimann, Judge
The Honorable Heather M. Mollo, Juvenile Referee
Cause No. 03C01-0606-JT-1264

December 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Nancy Moore appeals the trial court's denial of her motion to dismiss the involuntary termination of parental rights proceedings instituted by appellee-petitioner Bartholomew County Department of Child Services (DCS) with regard to her minor children, D.M., K.M., and J.M. The sole issue that Moore presents for review is whether the trial court abused its discretion and violated her due process rights when it did not appoint counsel for her during the Child in Need of Services (CHINS) proceedings.

Finding that counsel represented Moore during the fact-finding hearing and at other critical proceedings of the CHINS action and during the termination proceedings, we conclude that her due process rights were not violated. Thus, we affirm the judgment of the trial court.

FACTS

On July 11, 2005, Moore's minor children, D.M., K.M., and J.M., were removed from Moore's Columbus residence. Earlier that day, Deanna Gamroth, a Family Case Manager with the DCS, received a call from Columbus Central Dispatch for her to report to Moore's residence. Columbus Fire Department personnel were at the home and determined that Moore's ten-year-old son, D.M., had started a fire on the front porch. Moore's other two children, eight-year-old K.M. and six-year-old J.M., were also at the residence.

When Gamroth arrived at the house, she discovered that only the babysitter's husband, who had no supervisory responsibility over the children, was there. Approximately one hour later, after Moore failed to arrive, Gamroth entered the house and retrieved some of the

children's personal belongings. Once inside, Gamroth saw trash, dirty dishes, and piles of clothes throughout the home. She also observed that the beds were on the floor and some of them had no linens. There was evidence that other fires had been set in the yard, and Gamroth learned that the gas had been disconnected. As a result, the children were removed from the residence and placed in foster care.

On August 11, 2005, the DCS filed petitions alleging that all three children were CHINS. It was determined that prior CHINS petitions had been filed for the three children, and there were "open complaints" against Moore that involved her use of drugs and alcohol. Appellant's App. p. 6. Moore appeared with counsel on August 30, 2005, and denied the allegations. Moore also appeared with counsel at a fact-finding hearing on November 17, 2005. Following the presentation of evidence, all three children were found to be CHINS. At a dispositional hearing that was conducted on December 12, 2005, the trial court ordered Moore to contact and cooperate with the DCS caseworkers, find and maintain adequate housing and employment, and refrain from using drugs or alcohol.

Following that hearing, the trial court granted Moore's counsel's request to withdraw from the case. The trial court then directed Moore to contact the Bartholomew Legal Aid Society to request appointment of counsel to represent her. The trial court explained to Moore that she was not entitled to an automatic right to a public defender.

On February 15, 2006, Moore was incarcerated as the result of a probation violation. Moore chose to be incarcerated for forty-five days rather than completing ninety days of house arrest that had previously been ordered. Following Moore's release from jail, the trial

court conducted a status hearing on April 11, 2006. At that time, the trial court denied Moore's request for counsel, because Moore had significant education, including a bachelor's and master's degree, and had worked for a period of time prior to her incarceration. As a result, the trial court concluded that Moore had the ability to maintain employment and hire counsel.

During a permanency hearing that was conducted on May 25, 2006, Moore appeared without counsel. The trial court found that there had been a significant lapse in Moore's visitation with the children. Moore also admitted that she had not complied with the recommendations that were made following her psychological evaluation and that she had not maintained contact with Gamroth. Evidence was also presented that Moore's housing was "tenuous at best" and that she had not submitted to court-ordered urine drug screens. Pet. Ex. 4. The Court Appointed Special Advocate (CASA) testified that Moore was not actively participating in the case plan. Moore also acknowledged that there were petitions to revoke her probation pending in both Bartholomew and Brown County.

On June 23, 2006, the DCS filed petitions for the involuntary termination of the parent-child relationship between Moore and her three children. Moore was found to have violated her probation in Brown County on August 29, 2006, and she admitted to the allegations that were contained in the petition, which included a positive test for cocaine. On September 27, 2006, Moore appeared for a hearing in Bartholomew County concerning an alleged violation of probation. At that time, Moore tested positive for alcohol. As a result, Moore was incarcerated, where she remained in jail until October 4, 2006. Moore's

probation was subsequently terminated.

The initial hearing in the termination proceedings was held on October 2, 2006, at which time the trial court appointed counsel for Moore. During the next several months, it was established that Moore did not comply with the terms of the dispositional decree or case plan. Specifically, Moore did not maintain contact with Gamroth, find stable housing, or complete the IOP program that was a condition of her probation in Bartholomew County. Furthermore, at the time of the hearing, Moore was not employed and she was only “superficially” visiting with her children. Pet. Ex. p. 42.

Thereafter, on October 25, 2006, Moore began serving a 185-day sentence as a result of a probation violation in Brown County. Moore remained incarcerated until January 20, 2007. Following her release, Moore obtained employment at a McDonald’s restaurant in Columbus and continued to work there until the time of the termination hearing, which commenced on February 22, 2007. Prior to the presentation of evidence, Moore’s counsel filed a motion to dismiss the termination proceedings, alleging that Moore had been deprived of the right to legal counsel at the prior status, permanency, and review hearings in the CHINS matter. Moore contended that the absence of counsel at those hearings affected her ability to comply with the trial court’s orders in the CHINS matter and were “part of the proceedings for termination of the parent-child relationship.” Appellant’s App. p. 22-27. The trial court denied Moore’s motion to dismiss and entered an order terminating her parental rights over the children. Moore now appeals.

DISCUSSION AND DECISION

In addressing Moore's contention that the trial court abused its discretion when it denied her request for the appointment of counsel during the CHINS proceedings, we note that when the State seeks to terminate the parent-child relationship, it must do so in a manner that satisfies the requirements of due process. Hite v. Vanderburgh County Office of Family and Children, 845 N.E.2d 175, 181 (Ind. Ct. App. 2006). In determining the due process required in termination of parent-child relationship actions, the three-prong balancing test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), applies. A.P. v. Porter County Office of Family and Children, 734 N.E.2d 1107, 1112 (Ind. Ct. App. 2000). Specifically, the factors that must be considered are: (1) the private interests affected by the proceeding; (2) the risk of error created by the State's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. Mathews, 424 U.S. at 335.

The parent-child relationship is one of the most valued relationships in our culture, and a parent's interest in the care, custody, and control of her children is perhaps the oldest of the fundamental liberty interests. Hite, 845 N.E.2d at 181. The government's countervailing interest is also substantial. Indeed, the State of Indiana has a compelling interest in protecting the welfare of the children. Id.

The second factor requires an assessment of the risk of error that may have been caused by the trial court's denial of the request for court-appointed counsel. A.P., 734 N.E.2d at 1112. In E.P. v. Marion Co. Office of Family & Children, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995), we observed that "the Fourteenth Amendment to the United States

Constitution requires that no person be deprived of life, liberty or property without due process of law.” However, it was also recognized in E.P. that an erroneous CHINS adjudication has a far less disastrous impact on the parent-child relationship than would a termination or a paternity proceeding. Id. Hence, we determined that the due process guarantee of the Fourteenth Amendment does not require court-appointed counsel in a CHINS case. Id.

Additionally, we note that in M.M. v. Elkhart Office of Family & Children, 733 N.E.2d 6 (Ind. Ct. App. 2000), the respondent-mother—who was a fourteen-year-old ward of the State—had not been appointed counsel during CHINS proceedings. However, the trial court did appoint counsel for her after the child had already been adjudicated a CHINS. At the commencement of the termination hearing, M.M.’s counsel moved to dismiss the termination proceedings on the grounds that M.M.’s due process rights had been violated because the trial court had not appointed counsel for her at an earlier stage of the proceedings. In affirming the trial court’s denial of M.M.’s motion to dismiss, we observed that

[a]ppointment of counsel in a CHINS proceeding is a matter left to the discretion of the trial court. . . . Whether the trial court abuses its discretion in declining to appoint counsel in a CHINS proceeding depends on the unique facts and circumstances of each case. [Citation omitted]. “If lack of counsel is likely to lead to particularly damaging uncontested allegations and if such allegations be deemed established and not subject to subsequent challenge, those allegations might virtually assure a subsequent termination decision.” [E.P.] 653 N.E.2d at 1033]. In such situations the trial court might well abuse its discretion by failing to appoint counsel for an indigent parent. . . . While Mother admitted the general allegations that Son was a CHINS, we cannot say that the uncontested allegations “virtually assure[d] a subsequent termination decision.” See E.P., 653 N.E.2d at 1033. Rather, it was the

evidence of what occurred after the CHINS adjudication that eventually led to termination of Mother's parental rights.

Id. at 11. In addition to the circumstances set forth above, it was established that M.M. was still in high school at the time she was faced with CHINS proceedings. Nonetheless, we determined that the trial court did not abuse its discretion when it did not afford M.M. with counsel at all stages of the CHINS action.

On the other hand, the evidence in this case showed that Moore was highly educated with two bachelor's degrees and a master's degree. Pet. Ex. 5. Given these circumstances, it is apparent that the risk M.M. would not understand the proceedings was far greater than the risk that Moore would not understand the proceedings. Even more compelling, the record demonstrates that the trial court did provide Moore with counsel during critical stages of the CHINS proceedings. Specifically, Moore was represented during the fact-finding hearing and through the issuance of a dispositional decree.

We further note that this court's opinion in Smith v. Marion Co. Department of Public Welfare, 635 N.E.2d 1144 (Ind. Ct. App. 1994), is relevant here. In Smith, we concluded that a parent in a CHINS proceeding does not have an automatic right to court-appointed counsel. Instead, the appointment of counsel is a matter left to the discretion of the trial court. Id. at 1149. In Smith, the DCS showed that Smith did not visit her child on a regular basis, failed to participate in counseling, failed to maintain employment or demonstrate residential stability, and failed to complete a parenting class. As a result, we determined that Smith failed to show how having appointed counsel at the CHINS proceeding would have enabled her to show a reasonable probability that she would have made "the necessary

improvements that would result in permanent unification.” Id. at 1149. We also recognized that “the entry of a CHINS decree does not necessarily pave the path to a termination of the parent-child relationship.” Id. at 1148. Thus, we concluded “the absence of counsel at the CHINS proceeding had no bearing on the evidence that was presented at the termination hearing.” Id. at 1149. Because Smith failed to demonstrate how she was prejudiced by the denial of counsel and she did not show that the termination hearing would have had a different result if she had been afforded counsel during the CHINS matter, she was not entitled to a reversal of the trial court’s ruling. Id.

Once again, we note that Moore was present with counsel during the fact-finding hearing. Moore also had counsel through the issuance of the dispositional decree, which set forth the court’s requirements. If Moore was unable to meet those requirements, she—or her counsel—could have raised that issue at the hearing. Like the circumstances in Smith, Moore failed to show how she was prejudiced by the denial of counsel or how the termination outcome would have been different if she had been appointed counsel during the CHINS proceedings. More specifically, Moore has not demonstrated that representation by counsel at an earlier stage of the proceedings would have prevented her from being incarcerated for violating probation, from being unstable during the times that she was not incarcerated, from missing visits with the children, or from being unable or unwilling to complete required drug and alcohol treatment. In sum, the evidence failed to show that Moore suffered any prejudice by not having appointed counsel earlier in the proceedings.

Finally, we note that contrary to Moore's contentions, the relevant statutes support the DCS's argument that Moore was not entitled to an automatic appointment of counsel in the CHINS proceedings. For instance, Indiana Code section 31-32-4-1 provides that

The following persons are entitled to be represented by counsel:

- 1.) A child charged with a delinquent act, as provided by IC 31-32-2-2.
- 2.) A parent, in a proceeding to terminate the parent-child relationship, as provided by IC 31-32-2-5.[¹]
- 3.) Any other person designated by law.

(Emphasis added). Additionally, Indiana Code section 31-32-4-3(a) provides that the juvenile court shall appoint counsel for the parent in a proceeding to terminate a parent-child relationship, and section (b) of that same statute provides that the trial court may appoint counsel to represent any parent in any other proceeding.

With regard to CHINS proceedings, Indiana Code section 31-32-2-3 provides that a parent in such actions is entitled (1) to cross-examine witnesses; (2) to obtain witnesses or tangible evidence by compulsory process; and (3) to introduce evidence on behalf of the parent, guardian or custodian. Nowhere does the statute require that a parent be appointed counsel. In our view, had the legislature intended for a parent to be automatically entitled to counsel in a CHINS proceeding, it would have included such a provision in the statute.

In sum, we cannot say that the trial court abused its discretion in denying Moore's motion to dismiss the termination proceedings. Although the trial court could have appointed counsel for Moore at an earlier stage of the CHINS proceedings, there is no statute or case law requiring such an appointment. Moreover, Moore has failed to show how the

termination outcome would have differed had her request for the appointment of counsel been granted. Hence, Moore has failed to show that her right to due process was violated.

The judgment of the trial court is affirmed.²

DARDEN, J., and BRADFORD, J., concur.

¹ This statute provides that “a parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.”

² As noted above, Moore has not challenged the sufficiency of the evidence supporting the termination of her parental rights over the children. Nonetheless, our review of the record reveals that the DCS did, in fact, present clear and convincing evidence to support the trial court’s order, which provides that:

Termination of the parent-child relationship between Nancy Moore and her children, D.M., K.M and J.M., is in the best interests of the children given the length of time that they have been out of the home and under wardship and their need for permanency. During the time that the children had been under the care of the Department, approximately nineteen months, Ms. Moore has failed to remedy the conditions which led to the children’s removal. She has failed to show stability and has failed to complete necessary drug and alcohol treatment. She has failed to regularly visit with her children for months at a time due to her own actions in failing to submit to drug screens, being incarcerated, and failing to maintain contact with the Department so that visits could be scheduled. Also, the children have been out of her home on other occasions in the past for several months at a time. The children deserve stability and Ms. Moore has not shown that she is able to provide that for her children.

Appellant’s App. p. 10-11.